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This letter is in response to DEP letter of 20 November requesting additional information on Thomas Pond Improvement Association's (TPIA) compliance with two Conditions (9 and 10) of order #L-010896-37-A-N.

Condition 9 states:

> The owner of the dam shall maintain in effect liability insurance against personal injury incurred in the operation, repair, maintenance, and rebuilding of Thomas Pond Dam and any fence or barrier erected pursuant to this order in a minimum amount of $500,000 coverage. The owner of the dam shall designate abutters Selma Cohen and Louis D. and Mary Jane Chanese as additional named insured parties with respect to such coverage.

TPIA maintained a personal liability insurance policy since its inception in 1990 to 2015 when through no fault of TPIA it became impossible for the organization maintain liability insurance as the premium became greater than the amount of money the organization annually raises through membership dues and voluntary donations and insurers were changing their underwriting standards resulting in them exiting the liability insurance market for facilities such as the Thomas Pond dam.

Origin of Condition 9

DEP's records[1] show that the insurance requirement was added into the easements and eventually the Board Order due to a request by abutting landowner, Selma Cohen, as part of negotiations DEP entered into allowing the Cohen's to avoid an eminent domain taking of substantial property needed to maintain the dam. TPIA was not a party to these negotiations. While DEP had reservations about any insurance requirement, it agreed to include an insurance provision in the easements in 1987, and apparently added the insurance provision to the Board Order in 1989 after TPIA indicated that it was able to obtain such insurance at a price it could afford at that time. In 1990 the Board Order was finally complete and TPIA provided an insurance binder effective 7/10/1990 to DEP obtained from Traveler's Insurance through Clark Associates at a cost of $600.

Subsequently, the properties of both abutters at the time of the Board Order have been sold. Selma Cohen's property was sold by her estate in May of 2012, and the second abutters property has been sold twice. Neither abutter's current deed references the easement and both current abutters were unaware of the easements until TPIA discussed this issue with them.

TPIA also notes that while Condition 9 requires Selma Cohen and Louis D. and Mary Jane Chanese to be listed as named insured, there is no requirement for their successors or assigned to be so named. The language of this provision is unclear if the insurance requirement was intended to apply in perpetuity or if it was only intended to apply either during the original rebuilding of the dam and installation of the fence some three years later, or so long as the named parties were abutters. Regardless of original intent, TPIA maintained insurance in place as long as it was practical to do so.

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[1] Records produced in response to a FOAA demand letter dated May 8, 2023 from Steven Hazen, Robert Murch and Dana Watkins and sent to Commissioner Loyzim

Condition 9 is unprecedented and unique

TPIA submitted its own FOAA request[2] asking DEP to provide copies of all Water Level and abandonment orders for non-hydro dams to allow TPIA to determine if other dam owners were equally subject to insurance obligations. DEP responded with over 40 orders ranging from 1976 to 2020. TPIA reviewed all the DEP and SWCC Orders provided in response to its FOAA request and determined that condition 9 is unprecedented as no other Board or SWCC order contains any insurance provisions. It has been suggested to TPIA that DEP lacks statutory authority to include a condition of this type in an order. Regardless, it is clear that a personal injury liability insurance policy is not a DEP requirement for orders of this type.

Insurance compliance history

In 1990, prior to rebuilding the dam or installing the fence, TPIA obtained personal injury liability insurance for the dam from Traveler's Insurance for $600. By 2008 TPIA had changed to a policy from One Beacon at a cost of $2,744. TPIA was then able to obtain a slightly less expensive policy from Hanover Insurance, but that premium quickly rose to $2,858 for 2013-2014. When time for renewal of the policy came in July 2014 TPIA was informed by Hanover that the policy "Does Not Meet Current Underwriting Guidelines" and therefore would not be renewed. TPIA then made a good faith effort in 2014 to obtain an affordable policy by contacting Aletta Kimball of Chambers Insurance. She was unable to find any policy and offered the possibility that TPIA could obtain a policy through a broker for a minimum of $7,500.

Unable to obtain an affordable policy through Chambers in 2014, in 2015 TPIA reached out to Thomas Messier of Mason and Mason, another insurance broker, to obtain a quote. After extensive research Mr. Messier thought TPIA could obtain a policy for an annual premium of $2,500, but when we tried to get a firm quote the underwriter "declined the risk" and the only potential alternative Mr. Messier could find was also for a minimum annual cost of $7,500.

TPIA's latest attempt to obtain insurance in November of 2023 resulted in a frustrated speculation by our broker (Kelly Michaud of Clark Insurance) that she *might* be able to get a quote from a specialty high end insurer, but that such a policy would cost at least $25,000 with a $25,000 deductible.

Based on discussions with multiple insurance brokers, it appears that a policy covering only personal bodily injury liability is no longer sold and that all the insurers are only writing general liability policies which would include coverages beyond what is required. This explains why the policies have become unavailable to TPIA.

Impossible to perform

As a non-profit volunteer organization TPIA has no means to compel donations to fund the work of the Association, nor do we have either an endowment or a substantial bank balance. The table below summarizes the lack of affordability of liability insurance vs. TPIA's annual fund raising to clearly illustrate that it has become impractical and impossible for TPIA to obtain and maintain personal injury liability insurance.

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[2] Freedom of Access Act request, dated September 12, 2023 RE: Thomas Pond Improvements Association request for public documents for non hydro power dams

Year	Insurance Premium	Funds Raised	Premium to Funds Raised Ratio
1990 (1st Policy)	$600	$1,700	35%
2013	$2,744	$1,770	155%
2014	$2,848	$3,390	84%
2015	$7,500	$1915	392%
2023	$25,000	$5,365	466%

Impossibility of performance is well understood in law as a valid reason for non-enforcement or invalidation of a provision of a contract. While routine premium increases could be foreseen, in 1990 it was not possible to reasonably foresee any of the following would occur 20+ years in the future:

- premium increases far in excess of inflation ($600 in 7/90 is ~ $1098 in 7/2015[3]);
- impossibility of limiting a policy to required coverage only; or
- changes in underwriting standards leading most or all mainstream insurers exiting from the market for liability insurance for facilities such as the Thomas Pond dam.

It is clear that factors beyond the control of DEP or TPIA are responsible for the impossibility of TPIA maintaining a liability policy.

TPIA timely self-reported the impossibility of maintaining liability insurance to DEP

Even though it was under no clear obligation to do so, in March of 2014 Col, Robert Chapin, USAF (Retired), TPIA's current President, informed Peter Newkirk of DEP (attached) of TPIA's impending inability to afford insurance, seeking guidance and proposing what TPIA felt at the time might be a viable solution, obtaining agreement from the abutters that the insurance was no longer required. Mr. Newkirk responded to Col. Chapin by phone, so there is no written record of the response, but Col. Chapin recollects that Mr. Newkirk conveyed no sense of urgency and that his response was along the lines of *go ahead and try to work something out with the abutters if you feel like you need to, this is really between you and them.*

Rightly or wrongly, after Mr. Newkirk's response TPIA decided that no immediate action was required to address the insurance issue as its impression was that DEP seemed to feel this was a minor administrative matter and the abutters had never inquired about the insurance or indicated that they intended to exercise the specific remedy provided for in the easements.

Potential negative environmental impact due to Condition 9

The presence or lack of a personal injury liability insurance policy as outlined in condition 9 has no direct impact on the environment. However, forcing TPIA to obtain and maintain general (as the required coverage is not available separately) liability insurance has the potential to create negative environmental impacts in several ways.

First, insurance premiums would consume substantial funds that would otherwise be used for maintenance, repair, or improvement of the dam, or testing water quality, hiring additional boat inspectors, or other TPIA activities to protect the pond environment. For example, TPIA recently received a quote from Bancroft Contracting for $19,000 to repair largely cosmetic damage to the dam concrete structure and in-

[3] https://www.bls.gov/data/inflation_calculator.htm

stall plating to prevent future damage. TPIA does not have that much money available and plans to conduct fund raising in 2024. It's not feasible for us to buy insurance (if we even could) and fix the dam due to the large sums involved.

Second, if TPIA has an ongoing financial obligation it lacks resources to meet, then the organization could be considered bankrupt. Should this occur, TPIA might lose the ability to manage the dam for the health of the environment and in the manner mutually agreed to by the vast majority of property owners as shown by the survey[4] TPIA recently conducted.

TPIA is willing to work in good faith with DEP

Given the totality of the circumstances DEP can, and we believe should, exercise its judgment and discretion to determine that TPIA has acted in good faith and no specific enforcement actions related to compliance with condition 9 is necessary as there is no environmental impact from non-compliance. TPIA recognizes that is solely for DEP to determine.

Should DEP determine that a continuing insurance obligation exists and additional actions by TPIA are appropriate, TPIA respectfully recommends that DEP and TPIA agree on the parameters of a sustainable, reasonable and affordable insurance policy for personal bodily injury liability that TPIA should try to obtain. TPIA can maintain in its records the results of that effort when unsuccessful.

If DEP requires greater steps than proposed in the prior paragraph, TPIA is concerned that it will be unable to accomplish them on its own given its limited resources. Since this issue only arises due to DEP's unprecedented agreement with abutters to include an insurance provision in the Board Order, TPIA requests DEP's guidance and assistance in whatever next steps DEP requires. It is our current expectation that this may include negotiation with abutters and/or submission by TPIA to DEP of a petition for a minor amendment to the Board Order.

[4] https://thomaspond.org/2023-survey-results

Table of supporting documents used to prepare response to Condition 9 inquiry Available to DEP on request	
File Name	**Notes**
1990-07-10 dam insurance binder.pdf	Binder for Traveler's insurance policy from Clark Associates
1990-06-11 letter TPIA re insurance.pdf	Letter showing price quotes of $600 for insurance, with having raised $1700
2023-08-18-0181	Bill for 2008-2009 Insurance Policy for $2,744
2023-08-18-0168	Bill for 2013-2014 Hanover Insurance Policy for $2858 dated 8/10/2013 for general liability
2023-08-18-0164	Notice of Non-Renewal of Insurance from Hanover Insurance dated June 6, 2014
2023-08-18-0166	Email thread with Aletta Kimball of Chambers Insurance warning of pending non-renewal, indicating search underway for new policy where one insurer already declined
2015-30-10 TPIA Dam Insurance Search Result	Email thread with Thomas Messier of Mason & Mason re: inability to find affordable insurance for dam and an unconfirmed possibility of insurance at a high cost
2023-08-18-0153	Email thread with Kelly Michaud of Clark Insurance re: inability to find **any** insurance for the dam and speculating TPIA may be able to get something through a brokerage at extremely high cost (> $25,000). Explains that coverage for personal/bodily injury only for premises is not an option.
2014-03-09 Letter from TPIA to DEP re/ Insurance.pdf	Email from Bob Chapin to Peter Newkirk re: anticipated inability to afford insurance
2023-07-10-0017	14 June 2014 Treasurer's Report showing amount of funds raised in 2013 campaign of $1770 and bank balance of $1429.51
2023-08-18-0087	TPIA Annual Meeting minutes dated July 13, 2013 says "last years insurance was 2483". Also indicates that cash flow problems precluded paying premium on time.
2023-08-18-0082	16 April 2016 Board Meeting Minutes notes policy lapsed due to non-renewal, prohibitive cost of potential replacements, last year's premium $2,858. Notes bank balance of $3,954.51
2023-07-10-0015	11 July 2015 Treasurer's Report showing 2014 Appeal raised $3,390
2023-07-10-0013	09 July 2016 Treasurer's Report showing 2015 Appeal raised $1,915
2023-07-10-0010	08 July 2017 Treasurer's Report showing 2016 Appeal raised $2,135
Quote.doc	$19,000 2023 quote from Bancroft Contracting for dam concrete repairs and armor plating
Quote New Gate.doc	$63,000 2023 quote from Bancroft Contracting for an installed gate mechanism to replace stop logs

TPIA offers the following response regarding DEP's follow-up concerning TPIA's compliance with Condition 10 of Board Order #L-010896-37-A-N. TPIA has found the wording of this condition confusing in the past and has sought clarification from DEP regarding its meaning. Our response is based on our evolved understanding of this condition. If our understanding is incorrect, please advise us so that we may correct it.

The complaint DEP received alleges the following (emphasis added):

> 4. The TPIA has **failed to prevent the water flow over the Dam from exceeding 12 inches for 12 consecutive days in August**, **even though the TPIA could have avoided that** by proactively increasing flow over the Dam.in (sic) excess of 2.4 cubic feet per second but well less than the 12 inch maximum set forth in an attachment to the Order bearing an attestation from the Bureau of Land Quality Control and identified as a "Thomas Pond Dam Management Plan."

There has been no "violation" of condition 10 of the Board Order for at least the following 3 separate reasons:

1. Water discharge over the dam greater than 12" was due to "natural conditions beyond the dam owners control";
2. The limitation of outflow of 12" only applies to "control of spring conditions";
3. DEP staff stated in writing to TPIA that "There is no maximum flow requirement".

Condition 10 of the Order states (emphasis added):

> "Except as irreconcilably limited by inflow to the impoundment or **other natural conditions beyond the dam owner's control**, <u>for control of spring conditions</u> 12 inches maximum will be allowed for flow over the dam."

First, the heavy rainfall received on Thomas Pond and its drainage area is clearly an "other natural conditions beyond the dam owner's control". When such conditions occur, even in spring or as happened in the period subject to this complaint, and cause outflow to increase, TPIA is not in violation of condition 10. Condition 10 would apply if TPIA took some action during spring, such as deliberately increasing outflow to greater than 12" of flow, for no justifiable reason, or there were no unusual natural conditions.

As DEP is aware, the Thomas Pond dam water flow is controlled through the use of stop logs. The smallest stop log TPIA has available is a 2x4, which provides TPIA with an ability to control the dam crest height in increments of 1 ½ inches. As a practical matter, that limits how precise TPIA can be in controlling outflows.

As TPIA's logs[5] clearly show, TPIA took a total of 13 readings of water discharge over the dam crest in 2023 which show a release of 12" or greater. These 13 readings occurred on 7/17/2023 (12.5" flow) and for the 7-day (not 12 as claimed) period from 8/8/2023 – 8/14/2023. On 3 of these 7 days TPIA took multiple readings, and on 2 of these measurements the discharge was of only 12.5 inches of water flow, a discharge rate of ~20.5 cfs vs ~19.3 cfs at 12" (roughly 6% "extra" water), and reasonably within the tolerances of TPIA's control capability.

On 8/7/2023 two TPIA volunteers, Col. Chapin (President & Dam Keeper) and Mr. Jaffe successfully removed a large log obstructing the Dam since 8/4 and proactively increased water flow over the dam to 8" (~ 10.6 cfs) in anticipation of potential rainfall (there was .36" of rain on 8/5 which resulted in no

[5] https://thomaspond.org/detailed-dam-logs

measured change to lake level or flow, and no rain on 8/6 or 8/7). Lake level was at -18", ½" over the midpoint of the in-season range of -17 to -20 inches.

On 8/8/2023 the Raymond area received .62" of rainfall as measured by the Windham NOAA[6] weather station. After observing that the rainfall appeared heavier than anticipated, TPIA volunteers removed a board mid-storm to increase outflow. The contemporaneous log notes taken at that time state "*Lake level has risen more than anticipated*". To be specific, for the last reading taken on 8/8 the lake level was -15" and flow was 12.5", a flow change of ~3" net of board change and lake level change of ~3" due to a recorded rainfall of only .62" when a reasonable expectation would be level changes of .5 ~ 1.2" in one day due to a .6" rainfall.

We respectfully submit to DEP that the above contemporaneous records clearly document that any increase in water flow to greater than 12" was due to "other natural conditions beyond the dam owner's control", and therefore cannot be a violation of condition 10.

Second, it is unambiguous that condition 10 does not apply to water discharge at all times. By its own express terms, condition 10 applies only "…<u>for control of spring conditions</u>…", and this qualifier on applicability cannot be ignored. Spring is commonly understood in the US to be the months of March, April, and May. Condition 10 cannot be applicable to actions taken during any other part of the year, such as the August period in the complaint DEP received. Therefore, no violation of condition 10 occurred for this reason as well.

Third, on October 23, 1998, DEP Dams & Hydro Supervisor Dana Paul Murch, one of the individuals at DEP involved in development of the Board Order, unambiguously stated DEP's position regarding maximum flow over the dam. On Page 4 of his letter to TPIA Mr. Murch states[7] (underline in original):

> "<u>There is no maximum flow requirement; therefore, as far as DEP is concerned, flows can be as high as needed to control high water on Thomas Pond</u>."

We are aware that the individuals complaining to DEP about TPIA's compliance with the Board Order have previously claimed that TPIA cannot rely on DEP staff letters or emails regarding DEP orders. While we agree that DEP staff cannot unilaterally change an Order, we believe it is beyond question that (a) DEP staff can interpret and clarify Orders, and (b) that when DEP staff do so, the entity attempting to follow the DEP Order is expected to rely on the staff guidance. In this particular instance, Mr. Murch's participation in drafting the Order further indicates that he has first-hand understanding of DEP's intent in crafting this provision.

To be sure TPIA could rely on Mr. Murch's letter, TPIA Board member Mr. Jaffe reached out to Ms. Paye of DEP seeking to obtain clarification of the meaning and applicability of condition 10 to the August rain event, and to determine if DEP had changed the position articulated in Mr. Murch's 1998 letter regarding maximum flows. Ms. Paye responded to Mr. Jaffe's inquiry on 8/10/2023 (emphasis and footnote added):

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[6] ID USC00179720, the closest NOAA station to Thomas Pond with a reasonable historical record

[7] This letter, file name 2002-09-18 letter Murch to TPIA flows.pdf, was produced by DEP in response to FOAA demand letter dated May 8, 2023 from Steven Hazen, Robert Murch and Dana Watkins.

> "The section on Minimum Flows in Dana Murch's Letter (attached) from 1998 indicating that 2.4 cfs[8] is just a minimum flow **and that there is no maximum flow requirement seems the best interpretation to me, so the 12" flow would not be a hard limit in all circumstances**. The section on water levels seems the best interpretation to me as well. **No enforcement action would be taken if the guidelines Dana Murch recommended in his 1998 letter were followed**."

Ms. Paye's response clearly does not state that DEP has changed the position on maximum flow articulated by Mr. Murch in 1998. Unless formally told otherwise by DEP, TPIA believes it can reasonably rely on the guidance from Mr. Murch, and that no enforcement action will be taken when it does so. Thus, no violation of condition 10 could possibly have occurred for this reason as well.

We respectfully hope that the above answer demonstrates our good faith efforts to meet the conditions of the Board Order and adequately provides to DEP the *"reasoning or evidence regarding the alleged lack of compliance with Condition #9"* and "*reasoning or evidence in response to the complaint that flow over the dam exceeded 12 inches for 12 consecutive days in August in violation of Condition #10*". Please feel free to contact us if you have any questions or if you need additional information. All log records and photographic evidence of lake outflows and levels are available on thomaspond.org.

Robert R. Chapin — 10 January 2024

Col. Robert Chapin, USAF Retired — Date
TPIA President

Enclosure: 2014-03-09 Letter from TPIA to DEP re/ Insurance.pdf

[8] Mr. Murch's letter predates the improved scientific methodology which determined that 2.4 cfs was not the correct value for A.B.F

Mr. Peter Newquirk

Department of Environmental Protection

9 March 2014

)ear Mr. Newquirk,

I am writing you on behalf of the Thomas Pond Improvement Association of which I am the current president. The Association was formed when the State considered the current water control device on Thomas Pond to be "abandoned" and was looking for an entity to pass ownership of the dam off to for control and maintenance. In the Department of Environmental Protection Board Order, dated 25 April 1990, transferring the dam to TPIA there is a provision (Para C. 2. Para 4) designed to protect the interests of the abutting landowners that requires, inter alia, the "maintenance of a $500,000 personal injury insurance policy."

At that time TPIA secured such a policy for about $423. Since that time there have been several changes within the insurance industry which have impacted our costs. Many insurance companies got out of this line of policy underwriting for water dams leaving a very few writing general injury liability policies, usually for very large structures (The Thomas Pond Dam is 6 feet across). The insurance does not cover catastrophic dam failure only injuries on the dam structure itself. The costs have also gone up many times over the last 24 years and the same coverage now costs the Association $2858 annually.

While we have representation on our Board from around the lake it would be a mischaracterization to say that we have an engaged watershed community. The lake has about 400 shoreline and back lot homes and some undeveloped shoreline and it has several independent road associations with varying degrees of participation, some fulltime residents and many seasonal folks. I suspect this is not unlike many lakes in Maine. Consequently, it is extremely difficult to get even summertime residents engaged on lake wide issues. In some respects we are cursed by our good fortune as there are no water quality issues such as invasive milfoil, falling transmissibility, or dissolved oxygen levels to galvanize folks into participating. This includes raising funds to pay Association bills.

We ran a fund raising appeal last fall to over 400 landowners and managed to raise our bank balance to $942. Even if we were to double our fundraising efforts this spring it is doubtful we could raise enough funds to pay only our insurance obligations not to mention our other administrative and maintenance expenses.

If we were able to get the current abutting landowners to waive the insurance requirement (the land ownership has changed hands on both sides of the structure and there have been no incidents of injury on the dam structure that is completely enclosed in a locked and gated fence) would the Department countenance an amendment to the original 1990 order, relieving the Association from having to maintain such an onerous insurance policy? Before we engage with the abutting landowners, we would like to hear your view on the acceptability of such an approach. Thank you in advance for your time and efforts on our behalf.

Bob Chapin, President, Thomas Pond Improvement Association

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